

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From October 1, 1951
Through December 31, 1951

VOLUME 65

SI GARRETT, Attorney General

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QUARTERLY REPORT
of the
ATTORNEY GENERAL
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Volume No. 65

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF
ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from Oct. 1, 1951, through Dec. 31, 1951, as published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,

Attorney General.

OPINIONS

October 9, 1951

Hon. C. C. (Jack) Owen, President
Alabama Public Service Commission

C A P I T O L

Public Service Commission — Permit Fees.

1. Act No. 275, General Acts 1951, approved July 27, 1951 (Ms.), repeals all laws pertaining to the regulation and use of liquefied petroleum gas.
2. Manufacturers and wholesalers of liquefied petroleum gas are exempted from the provisions of Act No. 275, supra.
3. Under the provisions of Act No. 275, supra, the minimum permit fee is \$250.00 and the maximum permit fee is \$500.00.
4. The annual permit fee for the current year due October 1, 1951, required by Section 8 of Act No. 275, supra, of persons engaged in the business of selling liquefied petroleum gases is based upon the dollar volume of sales for the preceding twelve-months period ending September 30, 1951.
5. A "person" operating in several localities in the State of Alabama is required to obtain only one permit for engaging in the business activities enumerated in Section 7 of Act No. 275, supra.
6. (a) A plumber engaged in the business of servicing, repairing, or adjusting liquefied petroleum gas containers, tanks, or systems is required to secure the permit required by Section 8 of Act No. 275, supra. (b) A plumber, who merely repairs and adjusts liquefied petroleum gas appliances, is not required to obtain the permit required by Section 8 of Act No. 275, supra.
7. A plumber, who merely repairs or adjusts liquefied petroleum gas containers, tanks, or appliances, is not required to have the storage facilities required by Section 9 of Act No. 275, supra.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of September 11, 1951, is as follows:

"I respectfully request an official opinion on the following questions pertaining to the Alabama Liquefied Petroleum Gas Act, H. B. 228—Act No. 275.

"1. Does the repealing clause of this Act affect those provisions of the old statute which do not conflict with it? Specifically, that provision of the old Act which enabled the fire marshal to obtain a bond from manufacturing appliance dealers?

"2. Does a wholesale transport company have to obtain a permit?

"3. Is the permit a fee a minimum of \$250.00 with a possible maximum of \$500.00, or a minimum of \$500.00 with a possible maximum of \$750.00 for gas sale and distributive dealers?

"4. Will any payment over the minimum which is based on gross sales for gas selling dealers be deferred until the end of the fiscal year, which begins on October 1, 1951, or will it be based on the period ending September 30, 1951, which was before the law became effective?

"5. Will a company under one name with officers and storage facilities, or either at several localities, be required to obtain one permit or a permit for each locality?

"6. Are manufacturers or wholesale dealers affected at all by this Act?

"7. Will it be necessary for a plumber to obtain a permit for repairs or adjusting LP gas containers, tanks, or appliances?

"8. If a plumber must obtain a permit can he obtain one for repairing or adjustment LP gas containers, tanks, or appliances without having storage facilities as set out in the Act?"

The repealing clause referred to in our first question is Section 14 of Act No. 275, General Acts 1951, approved July 27, 1951 (Ms.), and reads as follows:

"Section 14. REPEALING CLAUSE.—The provisions of this Act and the rules, orders and regulations promulgated pursuant hereto are hereby declared to comprise **all the laws, rules and regulations** pertaining to the regulation and use of liquefied petroleum gases in this State, and all laws, parts of laws, rules and regulations in conflict herewith are hereby expressly repealed." (Emphasis supplied.)

In my opinion the underscored portion of Section 14, *supra*, clearly indicates that it was the intention of the legislature to repeal all laws pertaining to the regulation and use of liquefied petroleum gases and substitute therefor Act. No. 275, *supra*. This view is further strengthened by Section 12 of Act No. 275, *supra*, which specifically exempted manufacturers and appliance dealers, thus indicating that the legislature no longer thought it necessary to regulate them.

Your questions No. 2 and No. 6 are related, therefore, I shall consider them together.

Section 12 is as follows:

"Section 12. MANUFACTURERS AND APPLIANCES NOT AFFECTED.—The provisions of this Act shall not apply to manufacturers or purchasers of liquefied petroleum gases who sell all of the liquefied petroleum gases so manufactured, or purchased exclusively to resellers, nor shall the same apply to the sale of appliances which use, burn or consume liquefied petroleum gases. Liquefied petroleum gas distributions owned and operated by any municipality in this State shall also be exempt from the provisions of this Act."

Section 7 is in pertinent part as follows:

"Section 7. **INSURANCE AND BONDS REQUIRED: PERMIT.**—Before any person shall engage in or continue in the business of selling, distributing, storing, or transporting liquefied petroleum gases, except where the liquefied petroleum gas so handled is in quantities of less than one gallon U. S. water capacity and is an integral part of a device for its utilization, or in the business of selling, installing, servicing, repairing or adjusting liquefied petroleum gas containers, tanks or systems, at retail, in the State of Alabama, such person shall make application for, on forms provided by the Commission, and shall first obtain from the Commission a permit, and shall execute and file with the Commission a bond and the insurance herein required"

Reading Sections 12 and 7 together, it is obvious that the intention of the legislature was to confine the regulation to retail outlets of the business, and to exclude manufacturers and wholesalers. I, therefore, conclude in answer to your question No. 6, that manufacturers and wholesalers of liquefied petroleum gas are not affected by Act No. 275, supra. (Section 12, supra.)

In answer to your second question, I am of the opinion that the word "transporting" conferred to in Section 7, supra, means the movement of the liquefied petroleum gas that is incidental to its distribution by the retailer to the ultimate consumer. In light of Section 12, supra, I do not believe that the transportation of liquefied petroleum gas by a wholesale transport company between the manufacturer and the wholesaler, or between the wholesaler and the storage facilities of the retailer, was meant to be included within the term. I, therefore, answer your second question in the negative.

The answer to your question No. 3 depends on the meaning of Section 8 of Act No. 275, supra, which reads in pertinent part as follows:

"Section 8. **PERMIT FEES.**—Every applicant for a permit, as provided in Section 7 of this Act, shall at the time of issuance of the permit by the Commission and annually thereafter pay to the Commission a minimum permit fee of Two Hundred, Fifty Dollars (\$250.00); applicants who are engaged in the business of selling liquefied petroleum gases shall pay a permit fee equal to one-fourth ($\frac{1}{4}$) of one per cent (1%) of his annual gross receipts from the sale of Liquefied Petroleum Gas based on dollar volume sales for the preceding twelve (12) months, said annual fee however shall not be less than two hundred fifty nor more than Five Hundred Dollars (\$500.00), **which shall be the maximum fee due under the provisions of this Act.** Said permits and fees shall be due on October 1st and delinquent on October 31st of each year" (Emphasis supplied.)

Section 8, supra, in my opinion, requires a minimum permit fee of \$250.00 for all persons selling, distributing, storing, or transporting liquefied petroleum gas (with certain exceptions not here pertinent). Under this section, if an applicant is engaged in the business of selling liquefied petroleum gases, he must pay a permit fee equal to one-fourth of one per cent of his annual gross receipts from such sales, based on dollar volume of sales, for the preceding twelve months; said annual fee, however, shall not be less than \$250.00 nor more than \$500.00, which shall be the maximum fee due under the provisions of said act. If an applicant **does not** sell liquefied petroleum gases, the minimum as well as the maximum permit fee is the same, i. e., \$250.00. However, if he sells liquefied petroleum gases, the minimum amount of the permit fee is \$250.00 and maximum amount is \$500.00. It was not in-

tended that an applicant selling liquefied petroleum gases pay a minimum of \$250.00 and also pay an additional \$500.00 maximum if the volume of his sales would require such an amount. In other words, the maximum amount that can be required of a seller of liquefied petroleum gases is \$500.00.

In reference to your fourth inquiry under Section 8, *supra*, permit fees for those engaged in the business of selling liquefied petroleum gases are due on October 1, and are based on dollar volume sales for the preceding twelve months. Therefore, the permit fee for the current year due October 1, 1951, would be based on the twelve-months period ending September 30, 1951.

I can find nothing in the act to indicate that a company, operating in the manner described in your fifth inquiry, would be required to obtain a separate permit for each locality in which it operates. On the contrary, the wording of Section 7, *supra*, indicates that the permit authorizes the "person," (as defined in the act) to engage in the business activities enumerated therein "in the State of Alabama." I, therefore, conclude that only one permit is required of the company referred to in your fifth inquiry.

In answer to your question No. 7, your attention is called to Section 7, *supra*, which makes a permit mandatory for any one who engages in "servicing, repairing or adjusting liquefied petroleum gas containers, tanks or systems." I do not believe that this wording was intended to include appliances. This construction is strengthened by Section 12, *supra*, which exempts from the provisions of the act the sale of appliances, which use, burn, or consume liquefied petroleum gases. Therefore, I conclude that a permit would be necessary for a plumber who repairs or adjusts liquefied petroleum gas containers, tanks, or systems, but not for one who confines himself exclusively to the repair or adjustment of appliances.

Section 9 is in pertinent part as follows:

"Section 9. STORAGE.—The Commission shall require that every person in the business of selling and distributing liquefied petroleum gases or in the business of selling or installing liquefied petroleum gas tanks, containers or systems have located within the State of Alabama a minimum of 15,000 (water gallon capacity) storage for liquefied petroleum gases for each one thousand (1000) customers or a fraction thereof serviced by such person"

You will note that storage facilities are required only of those who are engaged in the business of selling and distributing liquefied petroleum, or in the business of selling and installing liquefied petroleum gas tanks, containers, or systems. In answer to your eighth question, a plumber who confines his activities to repairing or adjusting existing installations of liquefied petroleum gas containers, tanks, or appliances is not required to have storage facilities.

Very truly yours,

SI GARRETT

Attorney General

November 5, 1951

Hon. W. G. Pruett

State Highway Director

C A P I T O L

Farm to Market Road Act — Highways — Highway Department —
— Gasoline Tax — Warrants — Bonds.

1. There is no conflict between Section 3 of Act No. 855, General Acts 1951 (Ms.), approved September 12, 1951, and Section 2 of Act No. 856, General Acts 1951 (Ms.), approved September 12, 1951.

2. The Highway Director, in consenting to the issuance of interest bearing warrants, under the provisions of Act. No. 856, supra, may or may not incur liability as discussed herein.

3. The Highway Director, in estimating cost of construction, under the provisions of the Farm to Market Road Act, as amended by Act No. 855, supra, and in consenting to the issuance of interests bearing warrants, under the provisions of Oct. No. 856, supra, may reduce the estimated cost of construction in a reasonable amount.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 19, 1951, is as follows:

"Re: Act No. 855 and Act No. 856 of the Alabama Legislature of 1951

"Your opinion is respectfully requested in the interpretation of the above referenced Acts of the Alabama Legislature of 1951, in the following particulars:

"1. Act No. 855, Section 3, defines 'cost of construction,' enumerating the items which may be included in the term, and concluding with the statement—'the cost of construction shall not be deemed to include any interest which may be paid by the county for and on account of such construction, or in order to obtain funds therefor.'

"2. Act No. 856, Section 2—INSURANCE OF WARRANTS. This section limits the monetary total of warrants which may be issued in any case, by the statement—"The total principal amount of such warrants plus the amount of interest and the amount of such trustee's or depository's fees shall not exceed one-half of the total estimated cost of the construction provided for in the contract upon which the issuance of such warrants is based . . . ' The same section 2, further states—"The principal of or the interest on such warrants shall be payable solely from the monies received by the county from the county aid fund pursuant to the county's contract with the State Highway Depart-

ment upon the basis of which the warrants are issued;' It further provides that any deficiency may be the election of the county be paid from their gasoline tax revenues.

"Please give me your opinion as to whether there is any conflict in the respective sections of the two acts as quoted, one of which prohibits the inclusion of interest in the 'cost of construction' and the other specifically authorizes the payment of principal and interest by the county from state aid monies received in payment of one-half the cost of construction covered by the contract or contracts on which the warrants are issued.

"It is further requested that you give your opinion as to any liability of the Highway Director in giving consent of the issuance of a definite amount of interest bearing warrants, in the event that the actual cost of construction should be less than the estimated cost of such construction. An underrun of actual cost as compared to estimated cost, might bring about a situation that a greater amount of interest bearing warrants would be issued than could be repaid from state aid funds. Furthermore, would I have the authority, in giving consent to the issuance of warrants, to limit the amount by a certain percent less than the estimated cost."

In my opinion, there is no real conflict in the provisions of Act No. 855, General Acts 1951 (Ms.), approved September 12, 1951, and Act No. 856, General Acts 1951 (Ms.), approved September 12, 1951, cited in your inquiry.

It is further my opinion that the Highway Director, in giving his consent to the issuance of a definite amount of interest bearing warrants, as provided in Section 5 of Act No. 856, supra, may or may not be liable, depending on circumstances discussed herein, when the actual cost of construction is less than the estimated cost of construction, which situation may result in the issuance of a greater amount of interest bearing warrants than could be paid from the State County Aid Fund.

In my opinion, the Highway Director has authority, in giving consent to the issuance of such warrants, to limit the amount by a reasonable percent less than the estimated cost.

As stated above, I find no conflict in the quoted provisions of Acts No. 855 and 856, supra. The former amends the Farm to Market Road Act of 1943 (Act No. 329, General Acts 1943, p. 311), while the latter authorizes the county to borrow funds for road construction by the issuance of interest bearing warrants to be retired from the funds that the county will receive from the State County Aid Fund.

The Farm to Market Road Act of 1943, supra, with its amendments (Act No. 41, General Acts 1945, p. 47; Acts No. 440, and 441, General Acts 1947, pp. 319 and 321; Act No. 885, supra) establishes a program of county road construction whereby the State pays one-half of the cost of construction and the county pays the other half. Both the State and county derived their funds from the Gasoline Excise Tax. Under Act. No. 855, supra, the county may now obtain its funds from any available source.

The "conflict" in Section 3 of Act No. 855, supra, and Section 2 of Act No. 856, supra, is not, in my opinion, a real one. Section 3, supra, amending the Farm to Market Road Act, enumerates the items which may or may not be included in the "cost of construction" figure, which, of course, is the basis for determining the one-half share which the State and county each

bear. Section 3, *supra*, expressly excludes "interest which may be paid by the county for and on account of such construction or in order to obtain funds therefor." This provision appears in the original Farm to Market Road Act and the amendments thereto, including Act No. 855, *supra*, here discussed. The provision is merely a direction by the Legislature that in arriving at the basic amount of "cost of construction," one-half of which the State County Aid Fund is obligated to pay, the State shall not be obligated to pay an amount equal to one-half of the interest payments that the county makes in order to obtain the county's half of construction costs. Evidently, the Legislature did not consider interest paid by the county in obtaining money for its share as a legitimate construction cost for the purpose of the Farm to Market Program.

The exclusion of interest in computing "cost of construction" for the purposes of the Farm to Market Road Act was perhaps suggested by decisions of the Supreme Court of Alabama holding in effect that a county could issue interest bearing gasoline tax anticipation warrants and pledge certain of its revenues for the payment of principal and interest on such warrants in spite of the fact that gasoline tax revenue is earmarked "for the construction, improvement, and maintenance and supervision of highways, bridges and streets . . . and for no other purpose." Title 51, Section 647, as amended by Act No. 649, General and Local Acts, page 998. The effect of such decisions is that interest may be paid out of gasoline tax revenue earmarked for construction; hence, interest is a "cost of construction." *Herbert v. Perry* et al., 235 Ala. 71, 177 So. 561; *Bullock County v. Sherlock*, 242 Ala. 262, 5 So. 2nd 800.

The fact that interest is not included in "cost of construction," under the provisions of the Farm to Market Road Act, as amended by Act No. 855, *supra*, has no bearing on those provisions of Section 2 of Act No. 856, *supra*, which set the maximum amount of warrants which may be issued by a county in anticipation of receiving funds from the State County Aid Fund, and which provisions describe the funds from which such warrants are to be retired. In setting the maximum principal amount of county warrants which may be issued under Act No. 856, *supra*, it is provided:

"The total principal amount of any such warrants plus the amount of interest and the amount of such trustee's or depository's fees . . . shall not exceed one-half of the total estimated cost of construction provided for in the contract upon which the issuance of such warrants is based, if such warrants are issued prior to the completion of such construction, and shall not exceed one-half of the total cost of such construction, if such warrants are issued after the completion of such construction The principal of or the interest on such warrants shall be payable solely from the moneys received by the county from the county aid fund pursuant to the county's contract with the State Highway Department upon the basis of which the warrants are issued; provided, however, that any county may, at its election, provide in the resolution in which such warrants are authorized to be issued that, in the event the moneys received pursuant to any such contract should not be sufficient to pay at their respective maturities the principal of and interest on such warrants and any trustee's fees with respect thereto, then the same shall to the extent of such deficiency be payable tax out of all or any part of the share or port of the state gasoline tax allocated to such county pursuant to the provisions of Section 655 and Section 657, as amended, of Title 51 of the code of Alabama of 1940. . . ."

It will also be noted that Act No. 856, *supra*, provides that principal and interest are to be paid solely from the moneys received by the county from

the county aid fund. The payment of interest from the county aid fund may seem to violate the provision of the Farm to Market Road Act excluding interest from the "cost of construction," but, in my opinion, that is not true. When the county has a road constructed under the provisions of the Farm to Market Road Act, the county must furnish one-half of the cost of construction from its available funds, other than those obtained from the county aid fund and from the sale of interest bearing warrants, pursuant to Act No. 856, supra. The county must be financially able to pay the total cost of construction out of the proceeds of the sale of the interest bearing warrants, supplemented by other county funds derived from sources other than the county aid fund. When this total cost of construction has been paid by the county, it is entitled to receive from the county aid fund an amount equal to one-half of the cost of construction as such funds accrue in the State County Aid Fund. The county has earned its right to receive a certain amount of money (one-half the cost of construction, excluding interest) from the county aid fund by reason of the fact that the county has constructed a road pursuant to the Farm to Market Road Act. In arriving at the amount of the county's claim on the county aid fund, interest has been excluded, and cost of construction is the sole basis for determining what the county is to receive from that fund. The county, however, has anticipated receiving county aid funds in a certain amount (one-half cost of construction, excluding interest) and has borrowed funds under the provisions of Act No. 856, supra. This act allows the county to pledge all of its claim against the county aid fund to the payment of principal and interest on the warrants issued.

Since full construction costs have been paid by the county, the Farm to Market Road Act is not violated by the county's paying principal and interest or other fees out of the county aid fund. The payment of such interest and other fees out of the county aid fund does not, therefore, violate the prohibition excluding interest from the term "cost of construction" as used in the Farm to Market Road Act.

It is my opinion that liability on the part of the Highway Director in giving consent to the issuance of a definite amount of interest bearing warrants is a possibility, but a remote one, in the absence of fraud, bad faith, or negligence.

No interest bearing warrants may be issued under the provisions of Act No. 856, supra, without the consent of the Highway Director. Section 5 of Act No. 856, supra, provides:

"No warrants shall be issued pursuant to the authority of this act unless the Director of the State Highway Department shall consent in writing to their issuance. Such consent may be given by said Director at any time after the execution by the county and the State Highway Department of the contract or contracts with respect to which the warrants are proposed to be issued. Such consent shall constitute conclusive evidence of the validity of such contract or contracts, and of the compliance by the county with all applicable provisions of the farm to market road act and with all conditions precedent to the payment to or on the order of the county of the contribution provided for in the contract or contracts with respect to which such consent is given, except for actual completion of such part of the construction as may be uncompleted at the time such consent is given."

In consenting to the issuance of such warrants, the Highway Director has the duty, as do all public officers, to act in good faith and to exercise due care. The Highway Director is under bond conditioned on the faithful performance of his duties. Title 41, Section 115, Code of Alabama 1940,

as amended by Act No. 122, General Acts 1943, page 123. In failing to exercise due care, a state officer may be held liable in damages for any injuries caused thereby. *Finnell v. Pitts*, 222 Ala. 290, 132 So. 2. The Highway Director, as a public officer, when acting in good faith within the scope of his authority, is not liable in private actions. He may be liable for the negligent performance of his duty resulting in injury to individuals. 67 C. J. S., Officers, Section 125, pp. 417, 418. When exercising discretion or judgment within the scope of their authority, public officers are not liable for an error or mistake of judgment. 67 C. J. S., Officers, Section 127, page 420.

In consenting or refusing to consent to the issuance of warrants under Section 5 of Act No. 856 supra, the Highway Director should first determine that the county has a valid contract with the Highway Department under the Farm to Market Road Act. Section 7, Act No. 329, supra. He should further determine that the county has complied with the provisions of the Farm to Market Road Act and that there is no unperformed condition which would prohibit the county from receiving funds from the State County Aid Fund. The Highway Director need not determine that the construction is completed before giving his consent, but he should satisfy himself that if the county does complete the project, State County Aid Funds will be paid by the Highway Department as such funds accrue, to the amount of one-half of the cost of construction.

Since the estimated cost of construction forms the basis for the maximum principal amount of the issue, the Highway Director should satisfy himself that such estimate is an accurate and conservative figure. I see no reason why the Highway Director could not reduce the estimated cost of construction by a reasonable per cent to allow for errors in order to insure that the State County Aid Fund will be sufficient to pay principal, interest, trustee's and depository fees, and initial fees. If a mistake or error is made in the estimated cost of construction, resulting in an issue of warrants for which the State County Aid Fund is insufficient to pay principal, interest and fees, it is my opinion that such an error or mistake made honestly and in good faith and without negligence would not afford a basis for liability on the part of the Director.

If the Highway Director decides to reduce the estimated cost of construction by a reasonable per cent in order to allow for errors and to insure that the State County Aid Fund will be sufficient to pay principal, interest, trustee's and depository fees, and initial fees, the Director should take into consideration the fact that a county may at its discretion provide by resolution that in the event money that is received from the State County Aid Fund is not sufficient to pay principal and interest on the warrants issued, and trustee's fees in respect thereto, then the county may pledge any part of the state gasoline tax allocated to the county under the provisions of Title 51, Section 655 and Section 657, as amended, Code of Alabama 1940. If the county does make such a pledge, the Highway Director should consider this fact in arriving at the reasonable percentage by which he reduces the estimated cost of construction.

Yours very truly,

SI GARRETT

Attorney General

November 7, 1951

Hon. John A. Williams
Circuit Clerk and Register
Chambers County
LaFayette, Alabama

Elections — Absentee Ballots — Registers — Opinions Overruled.

1. When two elections are held on the same day (other than municipal elections held at a time different from a primary or general election), as in the instant case, a special election and a general election, under the provisions of Section 17 of Act No. 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General Acts 1951, approved September 12, 1951 (Ms.), the register, or person acting in his stead, is entitled to the compensation provided by said section for his services in handling the absentee ballots for each of the two elections.

2. Quarterly Report of Attorney General, Vol. 59, page 108, overruled and withdrawn.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of September 26, 1951, is as follows:

"Please give me your opinion if the register in chancery is entitled to the additional compensation for handling absentee ballots in a special election, where said special election is held on the same date as a regular primary or general election, said compensation being in addition to the regular compensation for such handling of such primary or general election, and I refer especially to the special and general election held on November 7, 1950."

The statute dealing with absentee ballots is Act No. 424, General and Local Acts 1949, page 601, as amended. It is provided in Section 1 of this act that it "shall apply to all primary, general, special, and municipal elections held in the State of Alabama."

Under the provisions of Act No. 424, as amended, *supra*, numerous duties are imposed upon the register, or person appointed to serve in his stead, in regard to handling of absentee ballots in any election to which the act is applicable, other than any municipal election held at a time different from a primary or general election.

The two elections referred to in your inquiry (a special election and a general election) are separate and distinct and must be conducted as separate and distinct elections. The duties imposed upon the register, or person serving in his stead, in regard to these elections must be performed separately in respect to each election. For example: (1) Separate envelopes

containing carbon copies of the ballots voted in each election must be mailed at the close of each day to the Secretary of State (Section 10). (2) Separate lists must be posted each day at the court house showing the names, residences, and polling places of voters voting absentee ballots on that day in each election; three days before the holding of each election, complete separate lists of the names, residences, and polling places of all voters voting absentee ballots in each election must be posted at the court house; similar separate lists must also be delivered to the judge of probate, and also sent by registered mail to the Secretary of State (Section 15). (3) Separate lists for each election must be delivered to the election officers of each polling place, showing the names and addresses of every person whose name appears on the official list of qualified electors for such polling place who voted an absentee ballot in each election (Section 16).

In an opinion of this office found in Quarterly Report of Attorney General, Vol. 48, page 106, it was held (1) that when an election on constitutional amendments and election to determine the classification of a county as wet or dry are held on the same day, the judge of probate must furnish a separate list of the qualified voters of the county for each election; and (2) that under the provisions of Title 17, Section 55, Code of Alabama 1940, the judge of probate may employ clerical help for the preparation of each of such lists, and such clerical help may be paid for the preparation of each of said lists.

The holding of the above opinion is in accord with an opinion of this office found in Quarterly Report of Attorney General, Vol. 8, page 198.

Section 17 of Act No. 424, supra, as amended by Act. No. 921, General Acts 1951, approved September 12, 1951 (Ms.), is in part as follows:

"Section 17. For his services under this Act during the twenty days prior to each election to which this act pertains and for his services on the day of the election, the register, or person acting in his stead, shall be paid the sum of ten dollars (\$10) daily. Such payment shall be made from the county treasury, except in the case of a municipal election held at a time different from a primary or general election in which event payment shall be from the city or town treasury." (Emphasis supplied.)

The reasoning used in reaching the conclusions in the above referred to opinions applies with equal force to the question here under consideration.

It is, therefore, my opinion that when two elections are held one the same day, (other than municipal elections held at a time different from a primary or general election), as in the instant case, a special election and a general election, under the provisions of Section 17, as amended, supra, the register, or person acting in his stead, is entitled to the compensation provided by said section for his services in handling the absentee ballots for each of the two elections.

I might add that the above conclusion is applicable regardless of whether or not any absentee ballots are issued or cast in either of the elections. Quarterly Report of Attorney General, Vol. 57, page 93.

Quarterly Report of Attorney General, Vol. 59, page 108, which is in conflict with the conclusion reached herein, is hereby expressly overruled and withdrawn.

Yours very truly,

SI GARRETT

Attorney General.

November 7, 1951

Honorable Sibyl Pool,

State Treasurer,

C A P I T O L.

Department of Conservation — Docks Commission — Oil and Gas — Lease — State Lands

1. The Department of State Docks and Terminals has control of all lands owned by the State of Alabama, under tidal waters of the State of Alabama, lying shoreward of harbor lines; and the proceeds from the lease thereof become a part of the operating fund of the Department of State Docks and Terminals.

2. The Department of Conservation has control of all lands owned by the State of Alabama, under its tidal waters, lying seaward of harbor lines; and the proceeds from the lease thereof, less management costs not to exceed five per cent, become a part of the general fund of the State of Alabama.

Opinion by Assistant Attorney General Straub.

Dear Miss Pool:

On October 23, 1950, the former State Treasurer, Hon. John Brandon, submitted a request for an official opinion to my predecessor, which is as follows:

"I am transmitting herewith a letter of the Department of Conservation forwarded to this office through the Governor's Office, dated October 9, 1950, together with Executive order number 19, both having reference to a certain lease executed October 9, 1950 between the State of Alabama as Lessor, and J. Brian Eby of Houston, Texas, as Lessee, a copy of which is also hereto attached.

"This oil and gas lease which covers the lands of the State of Alabama under Mobile Bay, Bon Secour Bay, Oyster Bay, the Mississippi Sound, Perdido Bay and the Gulf of Mexico, out to the three-mile limit, all within the jurisdiction of Alabama, embraces 680,000 acres, more or less.

"You will observe from Executive order number 19, dated October 9, 1950, that it is the intent of the Governor to cause the proceeds derived from the lease to be credited to the Department of State Docks and Terminals after deducting 5% for the Department of Conservation allowable by law for supervising said lease.

"By authority of Act No. 341, 1945 General Acts, Page 554, a duty was placed upon the Department of Conservation as to all unused land owned by the State of Alabama or any department thereof, to determine the best use for such lands, and such lands were placed under the exclusive jurisdiction, management and control of the Director of the Department of Conservation. Said Act also empowered the Director of Conservation to sell, or cause to be sold, timber or minerals or other natural resources from such lands and to leave such lands, with the approval of the Governor of Alabama.

"The term 'unused land,' as specifically referred to in the preceding paragraph, is defined under Section 219, Title 8 of the 1940 Code 'as being lands not utilized for the immediate purposes of any institution or department, not being cultivated, leased or mined, and not contiguous to the premises of any department, institution or State building.'

"It would appear that the bottoms of Mobile Bay and Mississippi Sound, within the jurisdiction of Alabama, would come within the definition of unused lands as herein-above expressed. In the event that this assumption is correct, it would further appear to the undersigned that after a five per-cent deduction of the proceeds derived from said lease that the residue should be caused to be covered in the General Fund of the State.

"Your official opinion as to the disposition of the proceeds derived from the lease referred to is therefore requested."

On January 12, 1951, an official opinion was rendered to him in answer to this request. Said opinion (which was not published in the Quarterly Reports of the Attorney General) is hereby withdrawn, and this opinion is substituted in lieu thereof.

His request refers to a letter from the Director of Conservation and to an Executive Order signed by Governor Folsom. In order to fully answer the question presented, I think it advisable to incorporate in this opinion the above mentioned documents.

"October 9, 1950

"Honorable John Brandon
State Treasurer
The Capitol

"Transmitted through the Governor of Alabama

"Dear Mr. Brandon:

"Cashier's Check No. A30098, dated 9 October 1950 in the amount

of \$34,000.00, payable to the Treasurer, State of Alabama, is hereto attached.

"This check covers the consideration for that certain lease executed on 9 October 1950 between the State of Alabama, as Lessor, and J. Brian Eby, of Houston, Texas, as Lessee. This oil and gas lease, which covers the lands of the State of Alabama under Mobile Bay, Bon Secour Bay, Oyster Bay, the Mississippi Sound, Perdido Bay and the Gulf of Mexico, out to the three-mile limit, all within the jurisdiction of Alabama, embraces 680,000 acres, more or less.

"The lease is made pursuant to the authority contained in the following acts of the Alabama Legislature:

"Act No. 597, 1943 General Acts of Alabama, approved 10 July 1943.

"Act No. 341, Sub-Section 11, 1945 General Acts.

"Act No. 538, 1947 General Acts of Alabama.

By virtue of the authority contained in Act. No. 341 of the General Acts of 1945, cited above, the State Department of Conservation has the duty placed upon it to manage and control the lands above leased, and in accordance with Section 261, Title 8, 1949 Supplement of the 1940 Code, the Department of Conservation, Division of State Lands, is entitled to a charge of five (5%) per cent, to-wit, \$1,700.00. This amount should be placed by you to the credit of the State Lands Fund of the department of Conservation.

"It is our understanding that, by executive order, the Governor of Alabama will advise your office as to the disposition of the residue of said moneys.

"Yours very truly,

/s/ Phillip J. Hamm,

Phillip J. Hamm

Director of Conservation"

"October 9, 1950

"EXECUTIVE ORDER NO. 19

"TO THE STATE TREASURER OF ALABAMA

"Montgomery, Alabama

"Dear Sir:

"I transmit you herewith letter of the Department of Conservation forwarding to you through this office check to the order of the Treasurer of Alabama in the sum of \$34,000.00. The check represents the first years rental payments under lease executed this day between the State of Alabama as lessor and J. Brian Eby as lessee. Reference is made to to the lease as the same remaining on file in the office of the Secretary of State for all the terms. However, in substance the lease is an oil lease of the tidal waters of Alabama south of Cochrane Bridge for a term of five years from October 9, 1950 at an annual rental of five cents an acre payable annually.

"This lease has been executed by the Department of Conservation insofar as supervision of the leased area is concerned in accordance with the provisions of Acts of 1945 pg 604 et seq. and approved by me as Governor for execution by that Department and by the Department having jurisdiction over the lands, the State Department of Docks and Terminals.

"Your attention is directed to Act No. 534 of the 1947 Legislature (Act of 1947, page 389) in which all other departments of the State are relieved of all duties, powers and responsibilities with reference to the submerged lands and lands beneath tidal waters of Alabama involved in this lease and jurisdiction over the same is vested in the State Department of State Docks and Terminals. These lands are leased by that Department in the instant lease under its general leasing powers as set forth in Title 38 Section 18, Code of 1940 as amended.

"Accordingly, after deduction of 5% of the proceeds of the rental payments for credit to the Department of Conservation Land Office in accordance with the provisions of the enclosed letter of transmittal to your office from the Department of Conservation, I, James E. Folsom, as Governor of Alabama do hereby order and direct that the net proceeds of such lease, when and as received by the State Treasurer, including the instant payment, be credited to the State of Alabama Department of State Docks and Terminals as a part of its operating fund, to be used by it in its work of harbor development.

"(Signed) James E. Folsom

Governor.

"ATTEST: Sibyl Pool

Secretary of State"

The lease referred to in this request appears to deal with submerged lands along the coastline of Alabama in and around Mobile Bay. Paragraph One of the lease is here quoted for the description of the property:

"The Lessor, for the consideration hereinafter set out, does hereby grant, Lease and Let exclusively to the Lessee all of the lands of the State of Alabama under Mobile Bay, Bon Secour Bay, Oyster Bay, the Mississippi Sound, Perdido Bay, and the Gulf of Mexico out to the three-mile limit from the junction of the eastern boundary of Baldwin County with the Gulf to the junction of the western boundary of Mobile County with the Gulf, and all the bays, bayous, lagoons, lakes and estuaries of a tidal nature connecting with any of the foregoing, or connecting any of the foregoing, up to the ordinary high tide mark, (except that this lease does not cover any area north of the south side of the bridges, tunnels and causeways commonly referred to as Cochrane Bridge) for the purpose of investigating, exploring and prospecting by geophysical and all other methods, and the drilling, mining for, producing and taking oil, gas, all forms of petroleum products and sulphur.

"This lease covers all of the lands owned by the State of Alabama beneath the waters and the space between the low and high tide marks, subject however to the rights of any riparian owner. It is understood by the Lessee herein that while the title of the State of Alabama to the lands beneath the waters of the Gulf of Mexico is the subject of dispute as to title in the several States, by reason of certain litigation re-

cently pending in the Supreme Court of the United States, nevertheless, in the event such litigation be terminated in favor of the State, or in the event Congress should, by appropriate legislation, release or surrender the rights of the United States to the several States, then this lease is intended, so far as the same effects the State of Alabama, to embrace the area beneath the lands out to the three-mile limit in the Gulf of Mexico. **Lessor does not warrant the title to the lands herein leased.**"

Act No. 534, General Acts 1947, page 389, approved October 13, 1947, provides that the Director of the Department of State Docks and Terminals is vested with the power and authority to sell "any submerged lands and made lands claimed or owned by the State, which lands are under or were formerly under any of the tidal waters of the State of Alabama, or which lands abut such tidal waters. This act shall apply **only** to such lands which lie shoreward of harbor lines established by the authorities of the United States and of the State of Alabama having jurisdiction over such matters." (Emphasis supplied.) (The "authority" of the State of Alabama having jurisdiction to establish harbor lines is the Department of State Docks and Terminals. Title 38, Section 39, Code of Alabama 1940.) Act No. 534, supra, further provides that: "All departments and agencies of the State, other than the Department of State Dock and Terminals are relieved of any duties, responsibilities and powers with reference to the lands which this act applies, as and when this act becomes applicable thereto." Clearly, a part of the lands in question lies shoreward of harbor lines established by the United States and the State of Alabama.

While Act No. 534, supra, does not directly give the power to lease the lands therein dealt with the power to sell ordinarily includes the power to lease. **Warren v. Wagner**, 75 Ala. 188. Therefore, it is my opinion that the Department of State Docks and Terminals has the authority, with the approval of the Governor, to lease such lands. In addition, Title 38, Section 18, Code of Alabama 1940, provides that the Department of State Docks and Terminals may dispose of, sell, or lease all property acquired under the authority of Chapter 1 of Title 38. The provisions of Act No. 534, supra, state that the proceeds of such sales contemplated by that act shall be paid to the Department of State Docks and Terminals and shall be used by that department in its work of harbor development.

Title 8, Section 2, Code of Alabama 1940, enumerates the powers of the Department of Conservation. Said section provides in pertinent part that one of the duties of the Department of Conservation is: "To maintain, supervise, operate and control all state lands other than those specifically committed to the use or control of some other department, board, bureau, commission, agency, office or institution of the state."

Title 8, Section 219 through 226, Code of Alabama 1940, and Act No. 341, General Acts 1945, page 554, as amended by Act No. 657, General and Local Acts 1949, page 1021, give the Department of Conservation power to make the most advantageous use of unused lands of the State. Under the above statutes, that part of the lands in question lying seaward of harbor lines established by the United States and the State of Alabama constitutes "unused lands owned by the State of Alabama," which are under the control of the Department of Conservation, and the revenue from which, less the deduction referred to below, becomes a part of the State of Alabama.

Premises considered, it is my opinion that the entire proceeds from the lease of such of the lands embraced in this opinion as lie shoreward of harbor lines established by the United States and the State of Alabama

should accrue to the operating fund of the Department of State Docks and Terminals. It is my further opinion that the proceeds from the lease of such of the lands embraced in this opinion as lie seaward of such harbor lines should accrue to the general fund of the State of Alabama, subject to the deduction of the reasonable cost of administering, managing, protecting, mapping, surveying, etc., not to exceed five per cent of the gross income, as provided in Sections 8 and 9 of Act No. 341, General Acts 1945, page 554.

Mr. Brandon's request furnishes me with no information as to where the harbor lines are located, or what acreage lies shoreward or seaward of such harbor lines therefore, I am unable to determine, and this opinion does not purport to determine, what proportion of the proceeds should accrue to each of the departments or funds mentioned.

It must be understood that the lease in question does not purport to embrace, nor does this opinion attempt to cover, those lands in which the government of the United States has paramount rights, **United States v. California**, 332 U. S. 19, **United States v. Louisiana**, 94 L. Ed. 800, **United States v. Texas**, 94 L. Ed. 805, unless by appropriate federal legislation the Federal Government should grant such lands to the State.

Yours very truly,

SI GARRETT

Attorney General

November 15, 1951

Hon. Henry W. Smith, President

Etowah County Board of Revenue

Etowah County

Gadsden, Alabama

Census — Elections — Etowah County — Ballots — Voting Machines.

1. Act No. 445, General Acts 1951, approved August 17, 1951 (Ms.), applies to Etowah County.

2. The provisions of Act No. 445, supra, have no application to "special" elections.

3. Where both voting machines and paper ballots are used in a polling place, the number of election officials required by Title 17, Sections 105 and 120, Code of Alabama 1940, must be appointed to serve each such voting machine and ballot box.

4. The county governing body, in a county wherein the use of voting machines has been authorized, has no authority to discontinue the use of voting machines in a polling place where voting machines have previously been installed, unless a sufficient number

of such machines to serve the entire county has not been furnished, in which case the machines may be installed in the polling places having the largest number of registered voters.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of October 4, 1951, is as follows:

"As President of the Etowah County Board of Revenue and under the authority of Title 55, Section 240 of the 1940 Code of Alabama and Amendments thereto, I respectfully request an opinion of you on the questions arising from the following statements:

"Under date of April 18, 1951, I, as President of the Etowah County Board of Revenue, requested the Senator and Representatives of this County in the State Legislature to introduce a bill in the legislature for the purpose of changing the then existing law relative to the use of voting machines in national, state, county, municipal and special elections. In this letter I set out my reasons for the request together with suggested changes in the law. A copy of this letter is hereto attached for your reference.

"In the regular session in 1951 of the Legislature a bill known as H. 139-Act Number 445 was passed by the legislature and approved August 17, 1951. There is considerable doubt in our minds as to when this act actually become effective and it is also necessary that same be construed in the light of the law relating to the number of election officials which would be required at each voting place to hold the election, the pay basis which they would be entitled to and whether said act is applicable to special elections.

"The questions which specifically need to be cleared are as follows:

"1. From the wording of the Act, same applies to all counties having a population of not less than eighty thousand nor more than ninety-four thousand inhabitants **according to the last or any future regular decennial Federal Census** (underlining supplied by writer). It is my understanding that the recent census taken in 1950 has not, as yet, been made official. The population of this county according to the 1940 Census was less than eighty thousand, however, we understand that the population according to the 1950 Census will come within the eighty to ninety-four thousand bracket. The question, therefore, is; does this Act apply to Etowah County at this time, even though the 1950 Census has not been made official:

"2. Section Two of said act is as follows:

"Each county governing body in all such counties may in discretion provide for the use of paper ballots or ballot boxes together with voting machines are used in any **primary, municipal or general elections.**' (Underlining supplied by writer).

"One of the questions which arises under this section is; does this

Act apply to special elections even though 'special' was omitted from the wording of the Act?

"3. The law relative to the use of paper ballots in an election requires six election officials (Title 17, Section 120 of the 1940 Code of Alabama), whereas the law relative to the use of voting machines requires four election officials (Title 17, Section 105 of the 1940 Code of Alabama). The question, therefore, which necessarily arises is; how many officials would be required under this Act where both voting machines and paper ballots were used in a voting place? In other words, would it be necessary that each voting machine in a voting place have four officials and each paper ballot box used in the same place have six election officials or could the election officials appointed for the voting machines also serve as the election officials for the paper ballot boxes?

"4. Would the county governing body be authorized, under this Act, to discontinue the use of voting machines altogether in voting places where voting machines had previously been used and to substitute therefor paper ballot boxes exclusively in any election covered by the Act in question?"

Your first inquiry is answered in the affirmative.

Act No. 445, General Acts 1951, approved August 17, 1951 (Ms.), is a general law of local application and the effective date, as set out in Section 4 thereof, is October 1, 1951.

However, since the applicability of the Act is based upon the Federal census, it is necessary to consider the question of whether Etowah County falls within the purview of the Act as a result of the 1950 census.

Title 1, Section 14, Code of Alabama 1940, as amended by Act No. 174, General Acts 1951, approved June 29, 1951 (Ms.), reads as follows:

"Section 14. Reclassification date.—The ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular federal decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census. **The provisions of the preceding sentence shall not apply to any law passed by the 1951 Regular Session of the Legislature of Alabama.** The provisions of this section shall not apply to any law which provides for the levying or collection of license taxes on a population basis or the distribution of State and County collected or administered revenues or funds on a population basis, and the population as disclosed by any federal decennial census, as soon as the same is proclaimed, published or **certified** by the Director of the United States Census Bureau, shall be used in administering any such law." (Emphasis supplied).

I do not know officially whether the 1950 census has yet been published. However, under date of September 11, 1951, the Director of the Bureau of the Census forwarded to the Hon. Gordon Persons, Governor of Alabama, a **certified** copy of the final worksheets of said census, covering all counties and incorporated places in the State of Alabama. These certified worksheets reflect that Etowah County has a population, based upon the 1950 census, of 93,892.

Therefore, since Act No. 445, *supra*, applies to those counties having a population of not less than 80,000 and not more than 94,000, according to

the last or any future regular decennial Federal census, Etowah County comes within the application of the Act, and the effective date thereof is October 1, 1951.

In answer to your second inquiry, I find the situation created by the passage of Act No. 445, supra, analagous to the situation that existed in the absentee ballot law at the time a prior opinion of this office was released on April 4, 1947. Quarterly Report of Attorney General, Vol. 47, page 13. In this opinion the following language appears:

"It is significant to note that the statutes governing absentee voting, as they existed prior to the enactment of Act. No. 478, supra, (Title 17, Sections 57-64 and Sections 417-424, Code of Alabama 1940) specifically provided that such statutes were applicable to any general, special, municipal or primary election, whereas, Act No. 478, supra, provides that it shall be applicable only to primary, general and municipal elections. It is my opinion that omission from Act No. 478, supra, of the word 'special' indicates an intent on the part of the legislature to exclude from the purview of such act special elections of the nature here under consideration.

"Reference to Title 37, Sections 37-38, Code of Alabama 1940, shows that an election to be held for voting upon adoption by the city of a commission form of government is specifically defined as a 'special' election. Hence, it is my opinion, that such an election does not fall within the purview of Act No. 478, supra. . . ."

In omitting the word "special" from Act No. 445, supra, perhaps the Legislature recognized that congestion and inadequate facilities (the reason for the passage of Act No. 445) would not exist in special elections to the extent sometimes found in other elections. At any rate, it is my opinion, based on the foregoing reasons and authority, that the provisions of Act No. 445, supra, do not apply to special elections.

Considering next your third inquiry, I am of the opinion that, where both voting machines and paper ballots are used in a polling place, the number of officials required by Title 17, Section 105, Code of Alabama 1940, should be appointed to serve each voting machine, and the number of officials required by Title 17, Section 120, Code of Alabama 1940, should be appointed to serve each ballot box where paper ballots are used.

In this connection, this office has heretofore held that, where more than one voting machine or ballot box is used at any polling place, election officials should be appointed for each such voting machine or ballot box. See Quarterly Report of Attorney General, Vol. 53, page 177. I think the instant situation is analagous.

Turning now to your fourth inquiry, your attention is called to the pertinent part of Title 17, Section 94, Code of Alabama 1940, which reads as follows:

" . . . Upon the installation of voting machines in any voting place, the use of paper ballots therein shall be discontinued, except as otherwise provided herein. Wherever, by reason of any constitutional or other legal debt limitation, it shall be impossible for any county or municipality to provide voting machines by either rental, lease or purchase for each election district, as provided, then it shall provide as many machines as it shall be possible to secure, and, as soon thereafter as possible, shall provide the remainder of such machines required hereunder.

The machines so provided shall be first installed in wards or precincts or beats having the largest number of registered votes.

The above provision has previously been construed in an opinion of this office found in Quarterly Report of Attorney General, Vol. 27, page 24, as follows:

"In compliance with the provisions of the above quoted excerpt from Section 94, if a sufficient number of machines for the entire municipality are not furnished, I suggest that you install a sufficient number of voting machines in the larger voting places within the municipality, so as to eliminate the necessity for the use of paper ballots in those voting places. In those voting places in which voting machines are not, or cannot be installed and used, for the reason that an inadequate number has been furnished, paper ballots should be used.

"I do not deem it inappropriate to add that the duty is imposed upon you to make every possible effort to secure these machines from the custodian thereof, and it is likewise the duty of the custodian of the machines to deliver such machines to you."

Except for the reason that a sufficient number of machines for the entire county are not furnished, there is no authority for the county governing body to discontinue the use of voting machines in a polling place where voting machines have previously been installed. It is also noted that Section 2 of Act No. 445, supra, specifically provides "for the use of paper ballots or ballot boxes **together with voting machines** at voting places in the counties where voting machines are used . . ." (Emphasis supplied.)

Very truly yours,

SI GARRETT

Attorney General

November 26, 1951

Hon. Harry L. Pennington

Circuit Solicitor

23rd Judicial Circuit

Huntsville, Alabama

Sheriffs — Coroners

1. When the office of sheriff is vacant the coroner is required to perform the duties of the sheriff.

2. A coroner, while performing the duties of sheriff during a vacancy in the office of sheriff and until a successor to the sheriff is appointed and qualified, may appoint deputy sheriffs.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of November 19, 1951, is as follows:

"In the Reports of the Attorney General, 1934-1936, at page 546, the following opinion is set forth: 'Answering your first question, in my opinion there is no authority under the general law for a coroner to appoint a deputy'

"Code of Alabama 1940, Title 12, Section 59, provides, 'The coroner must discharge the duties of the sheriff when the office of sheriff is vacant, and until his successor is qualified'

"I should like to have your official opinion on the following question: Does a coroner who is discharging the duties of the sheriff, when the office of sheriff is vacant, and until his successor is qualified, under the provisions of the Code of Alabama 1940, Title 12, Section 59, have authority, under the laws of Alabama, to appoint a deputy, or deputies, to assist him in the discharge of the said duties?"

In my opinion, your inquiry must be answered in the affirmative.

On November 13, 1951, the Supreme Court of Alabama returned a verdict in an impeachment proceeding brought against the Sheriff of Madison County. As a result of that decision, and on that date, the office of the Sheriff of Madison County became vacant. I am informed that the Governor has not yet appointed a person to fill the office of Sheriff of Madison County for the unexpired term. Until such appointment is made, you are advised that the Coroner of Madison County must discharge the duties of sheriff. Title 12, Section 59, Code of Alabama 1940. The coroner cannot discharge the duties of sheriff without appointing deputies to aid him in his work. You are advised, therefore, that the Coroner of Madison County, while acting as Sheriff of Madison County and until the Governor appoints a sheriff, and the appointee qualifies and enters the office of sheriff, possesses all the powers, and must perform all the duties, of the office of sheriff. He may appoint such deputies as may be necessary in the same manner as if he were actually the sheriff of the county.

It should be added that the appointment of such deputies should be for a term which will expire when the person appointed as sheriff by the Governor qualifies and enters office.

Your inquiry refers to an opinion of the Attorney General found in Biennial Report of Attorney General, 1934-36, page 545, which holds that a coroner may not appoint a deputy. This opinion has reference to a **deputy coroner** and not a **deputy sheriff**, and has no bearing on your inquiry.

Yours very truly,

SI GARRETT

Attorney General

November 29, 1951

Dr. John M. Gallalee

President, University of Alabama
University, Alabama

Assessments — University of Alabama — State Lands — Jefferson County.

Real estate in Jefferson County owned and held by the Board of Trustees of the University of Alabama that is served by the sewer system of said county is liable for charges assessed against said property for such service a may be rendered by the aforementioned sewer system, pursuant to Amendment 73 to the Constitution of Alabama 1901, and Act No. 619, General and Local Acts 1949, page 954.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of August 16, 1951, is as follows:

"On August 1, I requested your official opinion as to the liability of The Board of Trustees of the University of Alabama for the payment of municipal improvement assessments. A copy of said request is hereto attached and marked Exhibit 'A' for identification.

"Jefferson Hospital, Birmingham, Alabama, which is a division of The Board of Trustees of the University of Alabama, has just received the following communication:

"On the 12th day of July, 1949, the electors of Jefferson County approved an enlargement and extension of the County Sanitary Sewerage System. The proposition approved by the voters included the levy of a sewerage service charge by Jefferson County to pay the cost of such enlargement and extensions. The Jefferson County Sewer Amendment provides that this charge shall be an obligation of the occupant of property served, and if it is not paid, said charge shall become a lien on the property served.

"In accordance with the wishes of the voters, expressed at said election, Jefferson County is enlarging and extending the sewer system; and in the near future Jefferson County will commence to render bills for sewerage service, to pay for such enlargements and extensions as provided for by the Jefferson County Sewer Amendment.

"Jefferson County Sewer Service Fund

"108 Court House"

"To this communication is attached 'sewer charges' aggregating \$474.80. This is the first communication we have received in this matter. It appears to me that this charge is much similar to that of a municipal improvement assessment and we need your assistance in determining whether the University should or can legally pay said sewer charges.

"Will you, therefore, please be kind enough to furnish The Board of Trustees of the University of Alabama your official opinion as to whether or not the sewer charges above described to a county improvement assessment as to the payment of which the University would be exempt?"

"We should also like to be informed whether or not the University, as an arm of the state government and exempt from taxation, can legally pay the above described sewer improvement assessment?"

Generally, property of the State of Alabama, or of any department or agency thereof, is not subject to public improvement assessments. An exception to this rule is the imposition, by a county, of a public improvement assessment against such property when authorized by statute. *City of Huntsville v. Madison County* 166 Ala. 389, 52 So. 326. Amendment 73 to the Constitution of Alabama 1901, proclaimed ratified November 15, 1948, and Section 4 of Act No. 619, General and Local Acts 1949, p. 954, authorize such assessment by Jefferson County.

Amendment 73, supra, allows Jefferson County to issue bonds for the purpose of paying the expenses of construction, improvement and extension of the sewer system in said county. Amendment 73, supra, also provides that these bonds shall be payable primarily from service charges levied and collected from the persons and property whose sewerage is disposed of by the system regardless of whether or not persons or property are served by the system then being constructed, improved, or extended, or by some other part of said system. Section 4 of Act 619, which Act is supplemental to Amendment 73, supra, specifically states in part as follows:

"Said county commission is hereby authorized to levy sewer rentals or service charges (in this act sometimes referred to as 'services charges') upon, and collect such service charges from, the persons and property whose sewerage is disposed of or treated by the sewerage system of the county, whether such persons or property are served by the part of the sewerage system then being constructed, improved or extended or by some other part of such system. Such sewer rentals or service charges may be collected from, and be a lien upon, any property served by the sewerage system prior to as well as after the time when improvements financed by the issuance of bonds authorized under the Jefferson County Sewer Amendment to the Constitution shall be begun. Sewer rentals or service charges may be collected from, and become a lien upon, the property of any persons, firms, associations or corporations, including..... the state of Alabama, or the Federal Government, or any board, bureau, branch, agency, or department of....., the State of Alabama...."

The State of Alabama is the trustee of all lands belonging to the University of Alabama. *Cox v. Board of Trustees of the University of Alabama*, 161 Ala. 639, 49 So. 814.

Hence it is my opinion that the University of Alabama, an agency of the State of Alabama, is subject to the sewer rental and charges which have been or will be levied by the Jefferson County Commission under the authority of Amendment 73, supra, and Act No. 619, supra, and may legally pay said sewer charges.

Very truly yours,

SI GARRETT,

Attorney General

November 29, 1951

Honorable Creel Richardson, Superintendent

Dale County Schools

Ozark, Alabama

County Boards of Education—Schools—Salaries—Dale County.

Members of the Dale County Board of Education are paid under the provisions of Act No. 449, Local Acts 1947, page 315; therefore, they cannot claim the benefit of the two and one-half dollar increase in compensation of members of county board of education generally, provided for by Act No. 667, General and Local Acts 1949, page 1031, amending Title 52, Section 68, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of February 16, 1951, is as follows:

"Sometime during the legislative session of 1947, a local law was passed containing a provision whereby the members of the Dale County Board of Education were to be paid \$5.00 and expenses for attendance at meetings of the Dale County Board of Education; said number of meetings not to exceed eighteen meetings per year. During the legislative session of 1949, the legislature passed a general law hereby county board members were to be paid \$7.50 per meeting for attendance at county board meetings not to exceed twenty-four meetings per year.

"Beginning January, 1950, we have paid the members of the Dale County Board of Education at the rate of \$7.50, plus expenses, per meeting. Recently the question as to the legality of payment of the \$7.50, plus expenses, as provided for in the General Law of 1949 has been raised. We would like an opinion from your office concerning this matter. Specifically, does the local law passed in 1947 take precedence over the general law passed in 1949 with reference to the payment of the members of the Dale County Board of Education? If the local law takes precedence over the general law, will it be necessary for the members of the Dale County Board of Education to refund the extra amount paid by the Custodian of the Dale County School Funds? If the local law takes precedence over the general law in this particular case, does it necessarily follow that local laws always take precedence over the general laws passed by the legislature of Alabama?"

I am constrained to hold that Act No. 449, Local Acts 1947, page 315, was not repealed by the passage of Act No. 667, General and Local Acts 1949, page 1031. It is my further opinion, therefore, that the amount of compensation which lawfully may be paid to members of the Dale County Board of Education must be determined according to the provisions of the local law, and not according to the provisions of the general law.

The presumption is that a general act does not repeal a local or special statute. *Shepherd, et al. v. Clements*, 224 Ala. 1, 141 So. 255; *Kreutner v. State*, 202 Ala. 287, 80 So. 125; *Tucker v. McLendon, et al.*, 210 Ala. 562, 93 So. 797. Where the intention of the legislature is not apparent to that purpose, the general words of another and later statute will not repeal the particular provisions of a former one; the maxim of law being, "generalalia specialibus non derogant." *Scottish Union & National Ins. Co. v. Baker*, 17 Ala. App. 188, 84

So. 480 (Cert. den. **Ex parte Baker**, 203 Ala. 696, 84 So. 924). The underlying reason for the rule that special provisions are not repealed by general provisions is that the legislature is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act. **Hawkins, Judge, v. City of Birmingham**, 239 Ala. 185, 194 So. 533. See, also, 18 Ala. Dig., Statutes, Key No. 162; 59 C. J., Statutes, Section 536, page 931, et seq.

Act No. 667, supra, is amendatory of Title 52, Section 68, Code of Alabama 1940. It contains no reference whatsoever to the local act and, in my judgement, fails to justify any implication that the legislature thereby intended to repeal the local act. Members of the Dale County Board of Education were, at the time Section 68, supra, was amended, being paid under the provisions of the local law, and not under the provisions of the general law. The passage of Act No. 667, supra, had the effect of increasing from five to seven and one-half dollars, the compensation only of those board members who were being paid under the general law.

Therefore, since Act No. 667, supra, did not operate to repeal Act No. 449, supra, it is my opinion that the lawful compensation of the members of the Dale County Board of Education remains at five dollars per day while attending the meetings of the Board, not exceeding more than eighteen days in any one year. It follows that any compensation paid in excess of this amount was improperly paid, and that such excess should be refunded to the public school funds of the county, or an appropriate adjustment therefore otherwise made.

I deem it advisable to confine this opinion to a consideration of the particular acts in question, and not to answer your inquiry as to whether or not "local laws always take precedence over the general laws passed by the legislature of Alabama."

Yours very truly,
SI GARRETT,
Attorney General

November 29, 1951

Hon. J. V. Chambers

Judge of Probate

Chambers County

LaFayette, Alabama

Counties—Chambers County—Attorneys—Solicitors—Salaries.

Where an attorney, who had been generally retained by the county governing body for a period of one year in consideration of \$700.00 paid in advance, was later appointed to and accepted the office of deputy solicitor for such county, there is no legal requirement that such attorney refund a **pro rata** part of such retainer fee upon acceptance of the office of deputy solicitor.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion is as follows:

"The following resolution was adopted by the Commissioners Court of Chambers County, Alabama:

**"Resolution of Court of County Commissioners
of
Chambers County, Alabama**

"Whereas, the Court of County Commissioners of Chambers County, Alabama, in regular session on Monday, the 13th day of December, 1948 has deemed it advisable and necessary to retain an attorney to represent it in all its legal affairs for the term of one year commencing January 1, 1949; and

"Whereas Charles E. Fuller, Jr., of LaFayette, Alabama is a practicing attorney at law at the LaFayette, Alabama bar and is deemed by said Court of County Commissioners a fit and proper attorney to be retained for such representation for such period; and

"Whereas, said court of county commissioners has agreed with said Charles E. Fuller, Jr. to pay him the sum of \$300.00 at the commencement of such period as compensation for such retainer for such period.

"Now, Therefore. Be it resolved by the Court of County Commissioners of Chambers County, Alabama that said Charles E. Fuller, Jr., as such attorney at law be so retained by said court for such period at said agreed compensation, and that said compensation be paid to him as agreed herein as claims are paid to grand and petit jurors.

"Commissioner J. P. Hill offered the foregoing resolution, which was duly seconded and unanimously approved by the court."

"On April 28, 1949, said Charles E. Fuller, Jr., was appointed by Dan Boyd, Solicitor of the Fifth Judicial Circuit of Alabama, as Deputy Solicitor for Chambers County, Alabama.

"During the year 1949 and since his said appointment, said Charles E. Fuller, Jr., has engaged in the practice of law in Chambers County, Alabama, doing a general civil practice in addition to his duties as said Deputy Solicitor.

"On August 18, 1950, the auditing department of the State has charged back to me as Judge of Probate of said County, and as Chairman of said Court of Commissioners the sum of \$626.66 as unearned retainer for said attorney.

"Please give me your opinion on such charge back."

I am of the opinion that the auditors should not have charged back the sum of \$626.66 as unearned retainer for the said attorney.

A general retainer has for its object the securing beforehand of the services of a particular attorney or counsel for an emergency that may after-

wards arise. It has no reference to any special service, but takes in the whole range of possible future contention which may render attorneyship necessary or desirable. Counsel thus retained is not at liberty to accept employment or render service, adverse to the interest of the client thus retaining him. He is as to such client, monopolized. **Agnew v. Walden**, 84 Ala. 502, 4 So. 672; 5 **Am. Jur.**, Attorneys at Law, Section 158, page 355; 7 **C. J. S.**, Attorney and Client, Section 162, page 1019; 37 **Words and Phrases**, Retainer, page 512, et seq.

Courts of county commissioners or boards of revenue clearly have the authority to retain or employ attorneys when it is deemed advisable or necessary, and the agreed compensation to them may be paid as are claims to grand and petit jurors. Title 13, Section 229, Subdivision 8, Code of Alabama 1940; **State ex rel. Sossaman v. Stone, County Treasurer**, 235 Ala. 233, 178 So. 18; **Clark v. Eagerton et al., Com'rs.**, 207 Ala. 491, 93 So. 455; Biennial Report of the Attorney General, 1934-1936, pages 209 and 248. Therefore, the contract entered into on December 13, 1948, by and between the Court of County Commissioners of Chambers County and the Honorable Charles E. Fuller, Jr., under the terms of which he was paid the sum of \$800.00 as retainer for the calendar year of 1949, was within the power and authority of the said governing body.

I reach the foregoing conclusion for the reason that I construe the agreement to be in the nature of a general retainer, rather than a mere contract for annual employment. It was made on the basis of a lump sum payable in advance, and does not provide for a monthly salary. I think it significant that the words "retain", "retained," and "retainer" are used throughout the resolution. The purpose which prompted the county governing body thus to act is neither disclosed nor subject to my review, but it may be well that, in that body's sound judgement and discretion, the monopolizing of the said attorney's services, even though no service should ever actually be rendered, was well worth that amount to the county. Certain it is that as of January 1, 1949, and for the ensuing year, the attorney by his argument was deprived of the opportunity to act for adverse parties. For an attorney actively engaged in practice, the forfeiture of such opportunity is of itself a substantial concession. The retainer was, therefore, supported by sufficient consideration as of the date the agreement went into effect, even though the attorney was expected to render certain services during the ensuing year, and even though the parties did not contemplate the payment of additional compensation for such services. **Agnew v. Walden**, *supra*.

Since, in my judgment, the said \$800.00 payment represents a general retainer fee, the contract for which was entered into several months prior to the time the attorney was appointed Deputy Solicitor, I am of the further opinion that Title 41, Sections 150, 211, and 221, Code of Alabama 1940, are without application to the facts here involved. Cf. Biennial Report of the Attorney General, 1936-1938, page 517.

Subsequent to the submission of your request, Title 13, Section 260, Code of Alabama, was amended by Act No. 630, General Acts 1951, Regular Session (Ms.), approved September 4, 1951, to read as follows:

"The officers named in this article shall receive no compensation whatsoever for their service as such officers except the compensation provided in this article; provided, that Courts of County Commissioners and Boards of Revenue may retain or employ the Deputy Solicitor of the County to perform such duties as are not required by law of such deputy solicitor of the County, and the agreed compensation to such deputy solicitor of the County may be paid as are claims to Grand and petit jurors."

While the above conclusion has been reached independently of the 1951 amendment of Section 260, supra, the amendment strengthens the conclusion by providing that from September 4, 1951, thenceforth county governing bodies may retain or employ the Deputy Solicitor and pay him the agreed compensation for performing such duties as are not required of him by law. Cf. Biennial Report of Attorney General, 1928-1930, page 295.

Very truly yours,

SI GARRETT

Attorney General

November 29, 1951

Dr. John M. Gallalee

President, University of Alabama

University, Alabama

Colleges and Universities — University of Alabama — Municipalities — Assessments.

1. Real estate owned by the Board of Trustees of the University of Alabama devoted to public use is not subject to municipal improvement assessments.

2. The treasurer of the Board of Trustees of the University of Alabama may pay municipal improvement assessments, if such is the will of the board, and the assessments are in proportion to the increased value of the property.

3. A municipal improvement assessment against real estate owned by the Board of Trustees of the University of Alabama devoted to public use does not constitute a lien on said property.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of August 1, 1951, is as follows:

"Will you please give The Board of Trustees of the University of Alabama your official opinion in answer to the following questions:-

"(1) Is real estate owned by The Board of Trustees of the University of Alabama (which as an arm of the State Government is exempt from taxation) subject to municipal improvement assessments?

"(2) Can the Treasurer of The Board of Trustees of the University of Alabama legally pay a municipal improvement assessment against real estate owned by said The Board of Trustees?

“(3) Is a municipal improvement assessment against real estate owned by the Board of Trustees of the University of Alabama a lien thereon?”

Your first question must be answered in the negative. While municipalities generally are empowered to levy assessments against abutting property for public improvements, such power is insufficient, without more, to enable municipalities to assess state or county property devoted to strictly public uses. **City of Huntsville v. Madison County**, 166 Ala. 389, 52 So. 326; Quarterly Report of Attorney General, Vol. 54, page 51. Therefore, I am of the opinion that, if the property in question is devoted to strictly public uses, it is not subject to municipal improvement assessments.

Your second question must be answered in the affirmative. In Quarterly Report of Attorney General, Vol. 54, page 51, it was held that lack of authority in a municipality to levy such special assessment against property owned by the State of Alabama did not, however, preclude the state, if it so desired, from voluntarily contributing to the cost of such public improvements, provided the contribution is based upon the increased value of the property by reason of the special benefits derived from such improvements. See also **Town of Eutaw v. Coleman**, 189 Ala. 164, 66 So. 464. Thus, if it is the will of the Board of Trustees, and the assessment is in proportion to the increased value of the property, the treasurer of said board may legally pay such assessment.

Your third inquiry must be answered in the negative. If the property in question owned by the Board of Trustees of the University of Alabama is devoted to public uses, a municipal improvement assessment thereon does not constitute a lien on the property. **City of Huntsville v. Madison County**, supra.

Yours very truly,

SI GARRETT

Attorney General.

November 29, 1951

Hon. Ira L. Pritchett

Clerk of the Circuit Court

Marshall County

Guntersville, Alabama

Game and Fish — Conservation — Solicitors — Marshall County
— Clerks of Inferior Court — Inferior Courts — Arrests— Warrants
— Costs and Fees — Searches and Seizures.

1. The County Solicitor is required to appear and prosecute in the County Court of Marshall County, created by Act No. 362, Local Acts 1951, approved August 7, 1951 (Ms.), all violations of game and fish laws; and a solicitor's fee in the amount of ten dollars should be taxed and collected as costs and paid into the county treasury.

2. The Solicitor of the County Court of Marshall County issuing a warrant of arrest under provisions of Section 18 of Act. No. 362, supra, is not entitled to a fee for issuing said warrant.

3. The Clerk of the County Court of Marshall County is entitled to a fee of fifty cents for issuing a warrant of arrest under provisions of Section 18 of the Act creating said court.

4. The Circuit Solicitor of Marshall County is empowered to issue a warrant of arrest under provisions of Sections 14 and 18 of Act No. 362, supra.

5. Although the clerk or solicitor may not issue a search warrant under the provisions of Act No. 362, supra, the Judge of the County Court of Marshall County, as a magistrate, may issue a search warrant under the general law.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 20, 1951, is as follows:

"The County Court of Marshall County, Alabama, was created by Act No. 362 as passed by the Legislature and as approved by the Governor of the State of Alabama on August 7, 1951. This act provides, in effect, that the County Court of Marshall County, Alabama, shall have original and exclusive jurisdiction over all misdemeanor cases arising in the County.

"I request your opinion as to the following:

"1. Where the County Solicitor prosecutes a game and fish law violation and the defendant is adjudged guilty, should a solicitor's fee be taxed as part of the cost in such suit? If so, how much?

"2. Upon a defendant pleading guilty for the violation of a game and fish law, should a solicitor's fee be taxed as part of the cost in such suit? If so, how much?

"3. Where a nonresident pleads guilty to fishing without first obtaining nonresident license, should a solicitor's fee be taxed as part of the cost in such suit? If so, how much?

"4. Is there any authority for taxing as costs in a criminal action, a fee to the solicitor or clerk of such court for issuing a warrant of arrest, the solicitor and clerk being the only officials in said county authorized to issue a warrant of arrest by Section 18 of said Act 362? If so, how much?

"5. In view of Section 18 and 14 of said Act 362, can the circuit solicitor issue a warrant of arrest, etc., as authorized by Act Number 130 of the 1951 Legislature?

"6. Under said Act 362, may the clerk or solicitor issue a search warrant?"

Your inquiries numbered 1, 2 and 3, are answered in the affirmative. The amount of the solicitor's fee in each case is ten dollars.

Title 8, Section 50, Code of Alabama 1940, required the county solicitor or deputy solicitor to appear and prosecute violations of the game and fish laws. For a conviction in a justice of the peace court, or a court of similar jurisdiction, it was provided that a solicitor's fee should be taxed in the amount of five dollars. This office held that this fee should be taxed in all cases of convictions whether by trial or by plea of guilty. Biennial Report of Attorney General, 1934-36, page 586.

Section 50, *supra*, was amended by Act No. 449, General Acts 1945, page 6817, and as amended this section now provides as follows:

"Section 50. The solicitor of any county, or deputy solicitor of any county, in which any violation of the provisions of the game and fish laws or the rules and regulations set out therein, shall have occurred, shall appear on behalf of the State and prosecute the offender. No solicitor's fee shall be taxed against the defendant in any justice of Peace Court or court created in lieu thereof or court of like jurisdiction."

It will be observed, therefore, that the solicitor's fee of five dollars, which formerly was chargeable in such cases in the justice of peace court or court of like jurisdiction was abolished by the 1945 Amendment, *supra*. The solicitor is still required to appear and prosecute under the 1945 Amendment, but no solicitor's fee can be taxed when the prosecution or conviction is in a justice of peace court, or a court created in lieu thereof, or a court of like jurisdiction.

It is my opinion that Act No. 362, Local Acts 1951, approved August 7, 1951 (Ms.), creating an inferior court for Marshall County, called "The County Court of Marshall County, Alabama," does not create a court in lieu of the justice of peace court, or court of like jurisdiction. The jurisdiction given to that court is broader than the courts referred to in Section 168 of the Constitution of Alabama 1901. The County Court of Marshall County, Alabama, created by Act No. 362, is an inferior court, but not an inferior court in lieu of a justice of peace court, within the meaning of the Constitution.

By the terms of Act No. 362, *supra*, and particularly Section 1 thereof, the court has original and exclusive jurisdiction of misdemeanors committed in the county. By Section 14 of the Act, the County Solicitor of Marshall County is required to attend the court and prosecute all cases of criminal nature. The solicitor is placed on a salary basis by said Section 14.

Section 36 of Act No. 362, provides:

Section 36: That there shall be taxed and collected as cost in all criminal cases in said Court a Solicitor's fee which shall be in the same amount as now collected in Circuit Courts of this State in like cases, for the same offense and when collected shall be paid by the Clerk into the County Treasury."

So the solicitor's fee to be charged is the same as that which would be collected in the circuit court for a similar offense.

The schedule of solicitors' fees in the circuit court appears in Title 11, Section 85, Code of Alabama 1940. There is no particular solicitor's fee prescribed for convictions in game and fish law violations; therefore, the fee prescribed is "For each conviction of a misdemeanor, not otherwise provided for... 10.00." It should be pointed out that the general law also provides this fee to be taxed for conviction of a misdemeanor in an inferior court. Title 11, Section 86, Code of Alabama 1940. As you will note, Section 86, prevents a double assessment of solicitor's fees, and there is no second solicitor's fee which can be charged if the case is appeared.

In answer to your inquiry No. 4, it is my opinion that a fee for issuing a warrant of arrest cannot be taxed if the solicitor issues the warrant, but may be taxed if the clerk issues the warrant.

As stated in your inquiry, the Solicitor of the County Court of Marshall County (the county solicitor or the circuit solicitor—see Section 14 of Act No. 362, supra) or the clerk of said court are the only officers authorized by Act No. 362, supra, to take an affidavit and issue a warrant of arrest. See Section 18 of Act No. 362, supra. Although the solicitor of the county court is fully authorized to issue a warrant of arrest under Section 18, supra, the only fee prescribed for said solicitor by Act No. 362, supra, is in Section 36 of said act. This section merely prescribes a solicitor's fee and refers to the solicitor's fees collectible in the circuit court. On referring to this schedule, Title 11, Section 85, Code of Alabama 1940, there is no fee which a solicitor can claim for issuing a warrant of arrest.

On the other hand, if the Clerk of the County Court of Marshall County, Alabama, issues a warrant of arrest under the provisions of Section 18 of Act No. 362, supra, the clerk is entitled to the same fees that are allowed for like services in the circuit court. Section 16, Act No. 362, supra. The clerk of the circuit court is entitled to a fee in the amount of fifty cents for "issue of an writ, scire facias, or notice." See Title 11, Section 89, Code of Alabama 1940. This fee should, therefore, be taxed as costs when the clerk has issued a warrant of arrest.

In answer to your inquiry No. 5, you are advised that the circuit solicitor is fully authorized to issue a warrant of arrest in view of Sections 14 and 18 of Act No. 362, supra. Section 18, supra, provides that the solicitor of said court may issue a warrant of arrest, and Section 14, supra, provides that both the County Solicitor of Marshall County and the Circuit Solicitor are the solicitors for the County Court of Marshall County, Alabama. It is unnecessary to consider the authority of solicitors to issue warrants under Act No. 130, General Acts 1951, approved June 26, 1951 (Ms.)

In answer to your inquiry No. 6, it is my opinion that neither the Clerk nor the Solicitor of the County Court of Marshall County can issue a search warrant, but that the Judge of the County Court of Marshall County has the authority to issue a search warrant. The Local Act creating the County Court of Marshall County (Act No. 362, supra) does not refer to the issuance of search warrants. However, the general law provides that any magistrate may issue a search warrant under certain conditions. Title 15, Section 100 et seq., Code of Alabama 1940. It is my opinion that the magistrate referred to in the general law does not include the Clerk or the Solicitor of the County Court of Marshall County, but includes those officers specified in Title 15, Section 399, Code of Alabama 1940. Those officers are judges of the appellate and circuit courts of like jurisdiction throughout the state, judges of the county

courts, judges of the inferior courts and justices of peace, and the mayor or chief officer of any incorporated town. In my opinion, the Judge of the County Court of Marshall County is a magistrate and may issue a search warrant as such magistrate.

Yours very truly,

Attorney General

SI GARRETT

November 29, 1951

Hon. Charles W. Terry

Personnel Director

C A P I T O L

Merit System—Employment, Employers, Employees.

1. When a State employee is suspended by the appointing authority under the provisions of Title 55, Section 316, Code of Alabama 1940, such suspension is not subject to reconsideration or revocation after the period of suspension has terminated.

2. When one appointing authority has suspended an employee under the provisions of Section 316, supra, and the period of suspension has terminated, such suspension may not be revoked by another appointing authority.

3. An employee so suspended is not entitled to his salary for the period of his suspension.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of August 16, 1951, is as follows:

“Your attention is directed to the following provisions of Section 316, Title 55 of the Alabama Code of 1940:

“‘An appointing authority may, from time to time, peremptorily suspend any employee without pay or other compensation, and without the right of a hearing, as punishment for improper behavior, but such suspension or total suspension by such appointing authority of such person shall not exceed thirty days in any year of service. Such suspension with loss of pay may be effected only by service upon the employee by the appointing authority of written charges setting out clearly the delinquency for which such suspension was made, a copy of which must at the same

time be mailed or delivered to the director. The suspended employee shall have the right to file with the board and the appointing authority a written answer or explanation of such charges.'

"Acting under the provisions of the above Code Section, the director of a State department suspended an employee for ten days, beginning September 8, 1950, for being absent from his duties without proper authority or authorization. In January of this year a new director was appointed to head the department in question, and on July 24, 1951, he forwarded a form to the State Personnel Department requesting my approval of a revocation of this suspension stating that 'Suspension unjustified and salary to be refunded'.

"I questioned the legality of this action, so I referred the matter to the Personnel Board. Members of the Personnel Board were not sure that one appointing authority may legally revoke a suspension imposed by another. They requested I ask for your official opinion relative to the legality of such action.

"Your attention to this matter will be appreciated."

Under the provisions of Title 55, Section 316, Code of Alabama 1940 (which section is set out in your inquiry), an appointing authority is given the power to "peremptorily" suspend an employee without pay "as punishment for improper behavior." It was evidently intended by Section 316, *supra*, that the appointing authority have complete discretion in deciding whether the employee's behavior was improper and warranted the prescribed disciplinary action. This conclusion is based on the provisions of Section 316, *supra*, allowing an appointing authority to "peremptorily" suspend any employee, and denying the employee the right to a hearing on the question of the validity of his suspension. "Peremptory" is defined to mean absolute and not admitting of question, delay, or reconsideration. See Black's Law Dictionary, Third Edition, 1944, page 1350.

The director of the State department concerned in your inquiry, therefore, has full authority to suspend the employee for ten days for being absent from his duties without proper authority. *State, ex rel. Higgins v. Elsberg*, 157 Minn. 177, 195 N. W. 902. Since the suspension was valid at the time it was ordered, such appointing authority could not reconsider or revoke the order after the termination of the period of suspension.

Specifically answering your inquiry, in view of the above conclusions, it is my opinion that one appointing authority may not legally revoke a suspension imposed by another appointing authority after the period of suspension has terminated.

Under the above circumstances, the state employee is not entitled to draw his salary for a period during which he did not perform the duties of his employment. *Embry v. United States*, 100 U. S. 680, 25 L. Ed. 772; *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417.

Yours very truly,

SI GARRETT

Attorney General

November 29, 1951

Hon. Douglas C. Martinson

Judge, Inferior Court

Madison County

Huntsville, Alabama

Inferior Courts — Juvenile Courts — Probate Courts — Madison County.

Act No. 460, Local Acts 1951, approved August 17, 1951 (Ms.), transfers jurisdiction from Probate Court of Madison County to the Inferior Court of Huntsville, which has original and exclusive jurisdiction of all cases arising under Title 13, Section 350 et seq., and Title 34, Section 89 et seq., Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of September 17, 1951, is as follows:

"IN RE: Jurisdiction: Domestic Relations
Inferior Court of Huntsville, Alabama

"Upon the passage of Act 460, House Bill Number 841, approved August 17, 1951, the Probate Judge of Madison County, Alabama attempted to transfer all domestic relations files, dockets and pending cases to the Inferior Court of Huntsville, Alabama. His authority for the transfer of said cases being Title 34, Section 94, Code of Alabama 1940.

"Since said act number 460 mentions only juvenile matters the Judge of the Inferior Court of Huntsville, Alabama has declined to receive the dockets, files and pending cases relating to domestic relations from the Probate Judge, and since there is some doubt on the part of the Probate Judge with respect to same, I submit the following questions for your Opinion.

"1. Does Act Number 460, House Bill 841, approved August 17, 1951, have the effect of ordering the Judge of Probate to transfer all cases pending on the docket relating to domestic relations under Title 34, Section 94, Code of Alabama 1940, to the Inferior Court of Huntsville, Alabama?

"2. Does Act Number 460, House Bill 841, approved August 17, 1951, have the effect of attaching jurisdiction of the Inferior Court of Huntsville, Alabama, concurrently with the Probate Court under Title 34, Section 94, Code of Alabama 1940?"

It is my opinion that the Inferior Court of Huntsville has original and exclusive jurisdiction of all juvenile and domestic relations matters, that is to say, all causes based upon Title 13, Sections 350 et seq., Code of Alabama 1940, and Title 34, Sections 89 et seq., Code of Alabama 1940.

I find no local law establishing a Juvenile Court for Madison County or a Juvenile and Domestic Relations Court for said county. Under such circumstances, the probate court would, without a special or local law, have jurisdiction in such matters. Title 13, Section 351, Code of Alabama 1940, and Title 34, Section 94, Code of Alabama 1940.

Therefore, before the passage of Act No. 460, referred to in your inquiry, the Probate Court of Madison County had Jurisdiction over causes arising under Title 13, Section 350 et seq., and Title 34, Section 89 et seq., Code of Alabama 1940. The act referred to in your inquiry, No. 460, Local Acts 1951, approved August 17, 1951 (Ms.), provides for certain jurisdiction to be taken from the Probate Court of Madison County and vested in the Inferior Court of Huntsville. That jurisdiction which was transferred from the Probate Court to the said Inferior Court of Huntsville is described as follows:

".....all the jurisdiction, powers, authority and duties which are conferred on juvenile courts by Chapter 7 of Title 13 of the Code of Alabama (1940) or by **any other laws of the State,.....**" (Emphasis supplied.)

See Section 1 of Act No. 460, supra. It is apparent from that part of Section 1, above quoted, and particularly that part which is emphasized, that in transferring jurisdiction from the Probate Court to the Inferior Court of Huntsville, the Legislature intended to transfer more than that jurisdiction defined in Chapter 7 of Title 13. The Legislature went further and transferred jurisdiction which is conferred on juvenile courts "by any other laws of the state." By including this phrase, the Legislature necessarily referred to some other law or statute not included in Chapter 7 of Title 13. of the 1940 Code.

At least one of those statutes which confers jurisdiction upon juvenile courts is Title 34, Section 94, Code of Alabama 1940. This section confers upon specially created juvenile courts, or courts of domestic relations, jurisdiction over all cases arising under "this article." The article referred to is Article 3 in Title 34, Code of Alabama 1940, which includes Sections 89 through 104 of that title. It is true that since there was no specially created juvenile court, or juvenile and domestic relations court in Madison County, jurisdiction over causes arising under Title 34, Sections 89 through 104, Code of Alabama 1940, was vested in the probate court; but as of August 17, 1951, the date upon which Act No. 460, supra, was approved, there is now a specially created juvenile court in Madison County, which is the same court as the Inferior Court of Huntsville. Said in another way, the Inferior Court of Huntsville, Alabama, by Act No. 460, supra, is now the specially created juvenile court of that county, by virtue of Title 34, Section 94, Code of Alabama 1940. As such, the Inferior Court of Huntsville has jurisdiction over matters of domestic relations, included within Title 34, Sections 89 et seq., Code of Alabama 1940, even though those cases may not involve juvenile matters.

It is further my opinion that Title 34, Section 94, evidences a legislative intent to have the juvenile court in a county exercise jurisdiction both under Title 13, Section 350 et seq., Code of Alabama 1940, and Title 34, Section 89 et seq., Code of Alabama 1940. It is my opinion that the Legislature did not intend that jurisdiction over juvenile matters be exercised by one court and jurisdiction over matters which may or may not be juvenile matters arising under Title 34, Section 89 et seq., be exercised by another court. I believe that jurisdiction over causes arising under Title 34, Section 89 et seq., is that jurisdiction referred to by the Legislature in Section 1 of Act No. 460, supra, in the phrase "jurisdiction, powers, authority and duties which are conferred on juvenile courts.....by any other laws of the State."

It is true that Sections 2 and 3 of Act No. 460, supra, in providing for the transfer of cases from the Probate Court of Madison County (Juvenile

Court of Madison County) to the Inferior Court of Huntsville, refer to cases pending on the docket of the Juvenile Court of Madison County, and cases relating to juvenile matters or juvenile jurisdiction. In my judgement, however, the Legislature was referring to those cases described in Section 1 of Act. No. 460, supra, including, as I have shown, cases arising under Title 13, Section 350 et seq., and cases arising under Title 34, Section 89 et seq.

On the basis of the above reasoning, therefore, your question No. 1 is answered in the affirmative, and your question No. 2 is answered in the negative. In connection with your question No. 2, it should be stated that the Inferior Court of Huntsville has exclusive jurisdiction, and not concurrent jurisdiction with the Probate Court, over matters arising under Title 34, Section 89 et seq., Code of Alabama 1940. We have already stated above that Act No. 460, supra, actually creates a special juvenile court for Madison County. By the provisions of Title 34, Section 94, that court, the Inferior Court of Huntsville, possesses exclusive and original jurisdiction of cases arising under Title 34, Sections 89-104, Code of Alabama 1940.

Yours very truly,

SI GARRETT

Attorney General

December 7, 1951

Honorable H. E. Hendon

Tax Assessor

Macon County

Tuskegee, Alabama

Honorable J. H. Reynolds

Tax Collector

Macon County

Tuskegee, Alabama

Tax Assessors—Tax Collectors—Municipalities—Title 37, Section 462, Code of Alabama 1940.

1. Effective date of changed rate of tax assessors' and collectors' commissions for assessing and collecting municipal taxes depends on the terms of the local municipal ordinance or regulation.

2. Advertising of change in rate of tax assessors' and collectors' commissions for assessing and collecting municipal taxes is governed by Title 37, Section 462, Code of Alabama 1940, as amended.

Opinion by Assistant Attorney General Nachman.

Gentlemen:

Your request for an official opinion, bearing date of October 12, 1951, is as follows:

"We wish to request your opinion upon some effects upon us under the recent Legislature Act No. 868, as follows:

"Was it not the intention of the act for it to be applicable to both Assessor and Collector for the fiscal period immediately following its passage and approval by the Governor, if its provisions were compiled with.

"In the event that the Assessor and the Collector had petitioned the City Council of Tuskegee, and the Town Council of Notasulga, for the increase in commissions permitted, during the month of September, and approval was indicated, but final decision delayed for the time being, would not the decision when rendered, take effect at once.

"Since the cities and the towns had already made their levy for Ad Valorem Taxation, and had set the rate of commissions for the Assessor and the Collector as heretofore, and had advertised the same in the newspaper, would it be necessary to re-advertise the changed rate, or the entire advertisement with the change noted.

"We have awaited the passage of a statewide law to get relief from this small remuneration for these duties, and have never requested our Legislators for a local one. Some counties have had local laws, however, and would be appreciative of your opinion of how they may avail themselves of this opportunity to get the councils to aid them, either in answer to this, or to some other inquiry.

"May we respectfully submit that in 1939 a law was passed affecting the rate of commissions on state and county taxes, and the Assessors and the Collectors were enabled to secure advantage of it immediately, and it still holds."

Act No. 868, General Acts 1951, approved September 12, 1951 (Ms.), amending Title 37, Section 732, Code of Alabama 1940, establishes a maximum rate at which the commissions of collectors and assessors for the collection and assessment of municipal ad valorem taxes may be fixed. Section 2 of this Act provides that it is to go into effect upon approval by the Governor or its otherwise becoming a law. This Act merely establishes a maximum rate for the aforementioned commissions; the exact amount within this limit is left to the determination of the governing body of the municipality concerned. Quarterly Report of Attorney General, Vol. 31, page 44.

Thus, in reply to the first question presented in your request, you are advised that the effective date of the new rate of compensation, as fixed by such local governing body, depends upon the terms of the ordinance or regulation which prescribes such rate. If no effective date is indicated in the ordinance or regulation, then presumably the new rate would become effective when the ordinance or regulation becomes effective. As to the effective date of an ordinance or regulation, see Title 37, Section 462, Code of Alabama 1940, as amended.

In response to the second question presented, you are advised that the fixing of such a new rate would be necessarily have to be done by ordinance

or regulation "of a general or permanent nature," within the meaning of Title 37, Section 462, Code of Alabama 1940, as amended. Cf. **City of Talladega v. Jackson-Tinney Lumber Co.**, 209 Ala. 106, 95 So. 455. Compliance with the publication provisions of this section is, therefore, required. You will note that it is the publication of the ordinance or regulation itself, as adopted by the municipal governing body, which is required by said section. I can see no necessity for the republication of matter previously published. See **Ex parte City of Albany**, 213 Ala. 371, 106 So. 200.

Title 37, Section 670, Code of Alabama 1940, as amended, requiring the publication of notice that municipal ad valorem tax assessments have been completed, is not applicable to the situation about which you inquire.

The nature of the inquiry presented in the next to the last paragraph of your request, and the formation contained therein, are too indefinite for me to form an opinion upon the problems presented.

Yours very truly,

SI GARRETT

Attorney General

December 21, 1951

Hon. T. B. Wilder, Mayor

City of Andalusia

Covington County

Andalusia, Alabama

Municipalities — Taxation — Tobacco — Constitutionality.

1. A tax in the police jurisdiction of a city but not within the corporate limits of said city must be levied as a license tax pursuant to the exercise of the police power and be designed for the purposes of regulation rather than revenue.

2. A tax levied in the police jurisdiction of a city, as far as it pertains to the territory not within the corporate limits of the city, which is to be used solely for acquiring, constructing, providing, and maintaining parks, swimming pools, play grounds or other recreation facilities for the public, is invalid as being levied for revenue and not for the purpose of regulation.

3. The tobacco tax levied by ordinance of the City of Andalusia upon those persons who sell, store, or deliver tobacco products within the police jurisdiction but not within the corporate limits of the City of Andalusia is invalid.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of November 5, 1951, is as follows:

"On the 25th day of July 1947 the City of Andalusia adopted and approved an ordinance which imposed a tax on the sale, etc., of tobacco (cigarettes) within the corporate limits and outside the corporate limits but within the police jurisdiction. A copy of the ordinance is enclosed for your consideration and study in connection with the request of the City of Andalusia for your opinion as to the validity of the tax imposed, as hereinafter requested.

"Several merchants doing business outside the corporate limits but within the police jurisdiction of this city have refused to pay the tax, stating that the imposition of the tax is unconstitutional. The question of the constitutionality of the ordinance being raised, the City of Andalusia now requests the opinion of your office as to the constitutionality of the ordinance with respect to the imposition of the tax on the tobacco sold in the police jurisdiction, or kept for sale, as provided in the ordinance, and with respect to the purpose for which the tax is imposed.

"This request for your opinion has been duly authorized by the City Council of Andalusia, Alabama.

I am of the opinion that the ordinance here under consideration, a copy of which you enclosed with your inquiry, as far as it pertains to the territory within the police jurisdiction and outside the corporate limits of the City of Andalusia, is unconstitutional and, therefore, invalid.

Act No. 502, General Acts 1943, page 477 (Title 37, Section 733, 1949 Cumulative Pocket Part, Code of Alabama 1940), provides, in part, as follows:

"That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded....."

Title 37, Section 455, Code of Alabama 1940, provides as follows:

"Section 455. Power to adopt and enforce ordinances.—Municipal corporations may, from time to time, adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this title, and provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and enforce obedience to such ordinances by fine not exceeding one hundred dollars, and by imprisonment or hard labor not exceeding six months, one or both."

Pursuant to the foregoing statute, if the ordinance is to be declared valid and thus validate the tax levy in question, it is essential that it be effective as a measure of the police power and that it be directed toward regulation of businesses engaged in selling, storing, and delivering tobacco in the police

jurisdiction of Andalusia and not towards obtaining revenue. Quarterly Report of Attorney General, Vol. 61, page 27.

Sections 2 and 3 of the ordinance in question, providing for the amount of the tax and to whom it is to apply, read as follows:

"SECTION 2. TAX LEVY IN CITY. That in addition to all other taxes now imposed by law, every person who sells, stores or delivers any tobacco products shall pay a license tax to the City, and a license tax is hereby fixed and levied, which license tax shall be in the following amounts for this sale, storage, and/or delivery of the following named tobacco products in the corporate limits of the City of Andalusia, Alabama.

(1) Cigarettes. All cigarettes made of tobacco or any substitute therefor, two (\$.02) cents for each package containing twenty (20) cigarettes or less.

(2) Cigarettes. All cigarettes made of tobacco or any substitute therefor, four (\$.04) cents for each package containing more than twenty (20) and not exceeding forty (40) cigarettes.

(3) Cigarettes. All cigarettes made of tobacco or any substitute therefor, six (\$.06) cents on each package containing more than forty (40).

"SECTION 3. TAX LEVY IN POLICE JURISDICTION. Every person selling, delivering, or storing any of the tobacco products aforesaid in the police jurisdiction of the City shall pay to the City one-half the license tax levied under the preceding section on each of the tobacco products mentioned therein."

Section 9 of this ordinance, providing for the use of the funds obtained by this tax, is as follows:

"SECTION 9. USE OF FUNDS. All licensee taxes collected hereunder by the City Clerk of said City shall be deposited in a separate account or separate accounts in a bank or banks in said City under the designation 'Tobacco Tax Fund' and shall be used, upon appropriate orders of the City Council of said City, solely for the purpose of acquiring, constructing, providing and maintaining parks, swimming pools, play grounds, or other recreation facilities for the public within the corporate limits of said City or the police jurisdiction thereof."

A city is not authorized under the Constitution to levy a license tax on a business located wholly within its police jurisdiction and outside the city limits for the purpose of receiving general revenue either directly or indirectly; nor can the legislature extend such right to a city. **Hawkins v. City of Prichard**, 249 Ala. 234, 30 So. 2d 659; **City of Andalusia v. Fletcher**, 240 Ala. 110, 198 So. 64; **Alabama Power Co. v. City of Carbon Hill**, 234 Ala. 489, 175 So. 289. However, the power of the State to authorize the licensing of all classes of trades and employments cannot be doubted. There is just as little doubt of the right to delegate this power to municipalities. When this power is applied by municipalities to that territory within the police jurisdiction and not within the corporate limits, it must be applied for regulation only and cannot be used as a source of revenue. **Van Hook v. City of Selma**, 70 Ala. 361; **Hawkins v. City of Prichard**, supra.

"The police power has been held to embrace the protection of the lives, health, and property of the citizens, the maintenance of good order and quiet of the community, and the preservation of public morals." **Van Hook v. City of Selma**, supra. See also **Alabama Power Co. v. City of Carbon Hill**, supra.

In the case of **City of Prichard v. Richardson**, 245 Ala. 365, 17 So. 2d 451, it was said:

"... A municipality has the right to impose licenses for regulation on businesses outside its city limits, but within its police jurisdiction. But when under the guise of regulation, such tax measures, as a matter of fact, constitute taxation for revenue, then such taxation becomes taxation without representation, the taking of private property without due process and is violative of constitutional rights....

* * * *

"It seems well settled authority, that the power to license, if granted as a police power, must be exercised as a means of regulation only, and cannot be used as a source of revenue.'....

Section 9, supra, of the ordinance sets out the sole use of the funds collected by this tax.

The decisions above set out what the funds obtained by such tax may be used for in the police jurisdiction. In no instance is it shown that the use of the funds as set out in the ordinance in question would come within the meaning of "regulation" as stated in the court decisions of this State.

It is, therefore, my conclusion that the ordinance levying the tax, as far as it pertains to the territory within the police jurisdiction but not within the corporate limits of the City of Andalusia, is contrary to the provisions of the Constitution of this State and invalid.

Yours very truly,

SI GARRETT

Attorney General

December 28, 1951

Hon. W. A. Gayle, Mayor

City of Montgomery

Montgomery, Alabama

Motor Vehicles—Officers and Offices—Municipalities—Counties—
State and State Departments.

Since Act No. 780, General Acts, Regular Session, 1951 (Ms.), has no application to privately-owned motor vehicles, when secrecy is required in the performance of law-enforcement work state, county, and municipal authorities may authorize law-enforcement officers to

use privately-owned or rented automobiles and may reimburse employees for such use on a mileage basis.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of November 8, 1951, is as follows:

"Re: Act No. 780, approved September 11, 1951.

"Prior to the approval of the above named Act, our Police Department used '70' tags, and other tags on several of its cars. These cars were used mostly by our detectives in their work inasmuch as the use of cars with Municipal tags, or with some insignia indicating ownership, tended to hamper the detectives in their investigations.

"I understand that the same situation exists with reference to the State Highway Patrol, the several Sheriffs in the State, the A. B. C. enforcement divisions and possibly other law enforcement agencies.

"In this connection, I refer you especially to Section 2 of said Act in which the words 'owned or used' appear.

"I would appreciate it if you would answer the following inquiry:

"When a situation arises requiring secrecy in enforcement work, could the chief law enforcement officer direct that a subordinate or subordinates use their personal cars, or hired cars, in said secret investigations, and could the municipality, or other governmental agency, pay to the officer mileage for the use of said vehicle?

"We appreciate the spirit behind the Act, and feel sure that it was not passed with the view of hampering our several enforcement agencies; however, we are most desirous that our officers do not violate the terms of said Act."

I am of the opinion that your inquiry should be answered in the affirmative.

Act No. 780, General Acts, Regular Session 1951 (Ms.), provides in Section 1 thereof that "Motor trucks, semi-trailer trucks or motor vehicles owned and used by the state, counties or any municipalities of this state shall not be liable for the payment of license taxes levied, but shall carry tags" (emphasis supplied). There follows a description of the so-called "S" tags, county tags, and municipal tags which state, county and municipal motor vehicles shall carry.

Section 2 of Act No. 780, *supra*, is the penalty section of the act. This section provides that:

"Any person who operates a motor vehicle owned or used by the State or any county or municipality thereof with an improper tag or without a proper tag thereon shall be guilty of a misdemeanor and, upon conviction, shall be punished as prescribed by law." (emphasis supplied).

It will be noted that, while Section 1, supra, uses the term "owned and used," Section 2, supra, uses the term "owned or used." In my opinion the act was intended to apply only to motor vehicles owned **and** used by the state, county, or municipality. In other words, Act No. 780, supra, has no application to privately-owned motor vehicles, and the state, county, or municipality may on occasion use a motor vehicle which is not owned by the state, county or municipality, and which, under such circumstances, would not be required to carry an "S" tag, county tag, or municipal tag. Act No. 780, supra, would in such case have no application, for the reason that it applies only to motor vehicles owned **and** used by the state, counties, and municipalities.

Therefore, I conclude that when a situation arises requiring secrecy in law-enforcement work in a state, county or municipal officer may, upon proper orders and authority from his superiors, use privately-owned or hired motor vehicles in such secret investigations and be reimbursed for such use, on a mileage basis, by the state, county, or municipality.

Very truly yours,

SI GARRETT

Attorney General

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